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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 287

GERYS DESSALERNOS,

Petitioner,

vs.

JOSEPH SAVORETTI,

District Director of the United States Immigration and Naturalization Service, Miami, Florida,

Respondent.

BRIEF OF PETITIONER

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OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the United States Court of Appeals is reported in 244 F. 2d 178.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

DOES THE FACT THAT PETITIONER IS ADMITTEDLY STATUTORILY INELIGIBLE FOR SUSPENSION OF DEPORTATION UNDER SECTION 244(a) (5) OF THE IMMIGRATION AND NATIONALITY ACT PRECLUDE THE PETITIONER FROM PRESENTING FOR CONSIDERATION HIS APPLICATION FOR SUSPENSION OF DEPORTATION UNDER SECTION 244(a) (1) OF SAID ACT, IT BEING ADMITTED THAT THE PETITIONER FULLY MEETS THE REQUIREMENTS OF THE LATTER SECTION?

STATUTES AND REGULATIONS INVOLVED

Section 244(a) of the Immigration and Nationality Act, 8 U.S.C. 1254(a) provides:

"Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . .

"(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or

"(2) last entered the United States within two years prior to or at any time after the date of enactment of this Act; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of paragraph (4) of this subsection; was possessed of all the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

"(3) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his

spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

"(4) last entered the United States within two years prior to, or at any time after the date of enactment of this act; is deportable under paragraph (1) of section 241(a) insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 241(a), as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

"(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241(a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241(a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has

been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

STATEMENT

On the 8th day of February, 1955, petitioner filed his bill of complaint for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review pursuant to the Administrative Procedure Act (5 U.S.C. 1001 et seq.) and the Immigration and Nationality Act (8 U.S.C. 1252) of the administrative order of deportation entered by the respondent. The petitioner complained that he was a native and citizen of Greece; that he entered the United States on March 11, 1947, at Philadelphia, Pennsylvania, as a seaman and has remained in the United States illegally since that date. That on or about June, 1954, in connection with a deportation proceeding instituted against him, he applied for an adjustment of his immigration status, pursuant to the provisions of Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254 (a) (1)), to-wit, suspension of deportation.

The respondent and the Attorney General, throughout the deportation proceedings, have refused to consider his application for suspension of deportation on the ground that they considered him statutorily ineligible for relief from deportation and adjustment of his immigration status under the provisions of Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)), for the reason that it had been determined that he was also subject to deportation under the provisions of Section 241(a) (5) of the Immigration and Nationality Act (8 U.S.C. 1251 (a) (5)) for failure to

submit his annual address report card, and, as a consequence, his application for suspension of deportation would necessarily have to be considered under Section 244(a) (5) of the Immigration and Nationality Act (8 U.S.C. 1254 (a) (5)), a provision for which he could not statutorily qualify because of not having resided illegally in the United States for a period of ten years, as required in that subsection (Tr. 9-10).

The petitioner complained that this reasoning is erroneous and contrary to law, and that having qualified under Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)) for suspension of deportation, he was entitled to have his application considered under that provision notwithstanding, and to have the discretion of the Attorney General exercised (Tr. 1, 2, 3).

On July 11, 1956, the Judge of the United States District Court entered his final judgment deciding the case on the specific issue:

> "Does the fact that plaintiff is admittedly statutorily ineligible for suspension of deportation under section 244(a) (5) of the Immigration and Nationality Act (he, the plaintiff, not being able to meet the physical requirements of that section) preclude the plaintiff from presenting for consideration his application for suspension of deportation under section 244(a) (1) of said Act, it being admitted that the plaintiff fully meets the requirements of the latter section?" (Tr. 34-35)

The Court entered its judgment declaring that the interpretation of the law by the Board of Immigration Appeals was correct, and found that the petitioner was statutorily ineligible for suspension of deportation under all of the provisions of Section 244(a) (8 U.S.C. 1254(a)) (Tr. 35).

On appeal, the Court of Appeals considered the appeal of the petitioner and, on April 22, 1957, entered its judgment affirming the judgment of the District

Court. On October 14, 1957, certiorari was granted on petitioner's petition for certiorari filed July 17, 1957 (Tr. 50).

ARGUMENT

QUESTION:

> "DOES THE FACT THAT PETITIONER IS ADMITTEDLY STATUTORILY INELIGIBLE FOR SUSPENSION OF DEPORTATION UNDER SECTION 244(a) (5) OF THE IMMIGRATION AND NATIONALITY ACT PRECLUDE THE PETITIONER FROM PRESENTING FOR CONSIDERATION HIS APPLICATION FOR SUSPENSION OF DEPORTATION UNDER SECTION 244(a) (1) OF SAID ACT, IT BEING ADMITTED THAT THE PETITIONER FULLY MEETS THE REQUIREMENTS OF THE LATTER SECTION?"

The answer should be that if the applicant does meet the requirements of Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)), he is entitled to have his application considered, notwithstanding the provisions of Section 244(a) (5) of said Act, and is entitled to an exercise of the Attorney General's discretion on the application.

The District Court in its final judgment found that there was no true issue of fact to be tried, and further that the petitioner fully met the requirements of Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)). Therefore, it is unnecessary to indulge in further discussion concerning this point. The simple question is whether or not the petitioner would have to qualify under Section 244(a) (5) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (5)) *as well,* in order to have the Attorney General of the United States consider his application, this latter section imposing upon the petitioner residential requirements of ten years, which the petitioner unfortunately does not possess.

The respondent reasons that at the time of the deportation hearing an additional charge of deportation was lodged and sustained that he was deportable under Section 241(a) (5) of the Immigration and Nationality Act (8 U.S.C. 1251(a) (5)); that he is, therefore, required to qualify for suspension of deportation under Section 244(a) (5) of said Act, and cannot predicate his application for suspension of deportation upon Section 244(a) (1), under which the petitioner does qualify.

At first reading, it would seem to appear that the drafters of the section had been careless in their construction of the various sections of 244(a); so that Section 244(a) (1) and Section 244(a) (5) might appear inconsistent with each other in some respects. The provisions, however, are not in conflict at all.

In order to afford the reader an opportunity to see that such was not the case, it is necessary to consult the legislative background. In doing so, it is readily perceivable that Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)) was incorporated into suspension-of-deportation features of the Act for a specific reason and for the purpose of securing to a class of aliens benefits that had inured to them under the provisions of Section 19(c) of the Immigration Act of February 5, 1917 (8 U.S.C. 155(c)).[1]

The Immigration and Nationality Act of 1952 repealed, on December 24, 1952, the provisions of the Immigration Act of February 5, 1917. In the Report of the Committee on the Judiciary pursuant to S. Res. 137, 81st Congress, Second Session, Report No. 1515, the Congressional Committee made the following recommendation concerning suspension of deportation:

---

[1] "Deportation of any alien may be suspended if he is deportable on grounds other than that he is a member of one of the following classes: Criminal, immoral, subversive, mentally or physically deficient, or smuggler. The alien must prove that he has been of good moral character for at least five years preceding his application, and that deportation would result in serious economic detriment to a citizen or legally resident alien who is a spouse, parent, or minor child, or that he was in the United States on July 1,1948, and has resided here for seven years or more."

> *"The subcommittee recommends that the present suspension of deportation provisions of the law be abolished within five years and that no alien who entered the United States within a period of two years prior to the enactment of the proposed legislation shall be eligible under the present suspension of deportation provision of the law, as modified."* (italics ours)

Thus it is clear that Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)) carries out this Congressional intent to confer on persons *then* residing illegally in the United States, who could qualify under Section 19(c) of the Immigration Act of February 5, 1917 (8 U.S.C. 155(c)), a continuing privilege for a period of five years after the date the Immigration and Nationality Act of 1952 became effective, provided that he had entered the United States more than two years prior to the effective date of that Act.

This provision established a special class, which could not be added to by the passage of time, and protected their interests for a period of five years. The petitioner belongs to this class.

The preamble of Section 244(a) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)) states:

> "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . . "

and thereafter lists five subsections, each of which subsections is separated by the word "or". The use of the word "or" gives the construction of the subsections a clear meaning that each subsection is to stand independently, and that an applicant may qualify under any one of the five subsections, so that the Attorney General may consider an application thereunder on its merits and invoke his discretion.

Section 244(a) (1) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (1)) provides:

> "(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or"

A careful examination of each subsection would indicate that each subsection contains its independent provisions that exclude certain classes of aliens from eligibility. Most significant is that portion of Section 244(a) (1) which characterizes those who qualify:

> *"is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended,"* (italics ours)

No reference to the prior effective Act of 1917 is made in any other subsection of 244(a).

Section 19(d) refers generally to those aliens who are deportable because of belonging to certain criminal, immoral, or subversive classes and was, prior to the present Act, a condition of eligibility for suspension of deportation.

Comparing the remaining subsections, it is clear that subsections 244(a) (2), 244(a) (3), 244(a) (4), and 244(a) (5) of the Immigration and Nationality Act (8 U.S.C. 1254(a) (2), 1254(a) (3), 1254(a) (4), and 1254(a) (5)) follows those recommendations made by the Subcommittee on Immigration, as new grounds for suspension of deportation that would fall within the deportation provisions of the Immigration and Nationality Act of 1952. Section 244(a) (2), is for the most part analagous to Section 244(a) (1), but because of the time provisions contained therein, did not serve to give relief to any person who entered the United States more than two years prior to the enactment of the Immigration and Nationality Act on December 24, 1952. Within each of these four subsections independent exclusionary provisions for eligibility are self-incorporated.

In subsection 244(a) (2) it is said:

"is not within the provisions of paragraph (4) of this subsection".

In subsection 244(a) (3) it is said:

"is not within the provisions of paragraph (4) or (5) of this subsection".

In subsection 244(a) (4) it is said:

"is not within the provisions of paragraph (5) of this subsection".

In subsection 244(a) (5) all persons excluded from qualifying in subsections 244(a) (2), 244(a) (3), and 244(a) (4) are permitted to qualify.

Thus it is clear that Section 244(a) (1) stands alone and for a specific purpose, and persons qualifying thereunder qualify independently of all other subsections of 244(a). Ineligibility under one subsection does not exclude eligibility under another.

Subsections 244(a) (2) and 244(a) (3) pertain to persons whose grounds for deportability arose conjunctively with their entry into the United States, and impose the requirement that they must have last entered the United States within two years prior to, or at any time after, the date of the enactment of the Immigration and Nationality Act of 1952, which would indicate that it is prospective, without limitation in its application; whereas Section 244(a) (1) died on December 24, 1957.

Reading the various subsections in para materia with the recommendations of the Subcommittee on Immigration, it is clear that this subsection was promulgated for the purpose of preserving to persons such as the petitioner the right to have an application for suspension of deportation considered under the provisions of a law analagous to Section 19(c) of the Immigration Act of February 5, 1917, (U.S.C. 155(c)), and to give them ample opportunity for a period of five years to exercise their rights thereunder.

It is clear that the respondent has neglected to consult the legislative intent in order to administer this provision of the law pertaining to suspension of deportation.

"The five paragraphs of §1254(a) show a statutory design to enact remedial legislation covering a number of different contingencies. In formulating the several possible categories, Congress provided that a deportable alien is eligible for the discretionary relief of suspension of deportation if he qualifies under the provisions of paragraphs (1) *or* (2) *or* (3) *or* (4) *or* (5). By the use of the disjunctive conjunction, "or," it is clear that Congress intended to present a choice dependent only upon the alien meeting the standards as required in the particular paragraph of which he seeks to avail himself. Sevitt satisfies the requirements of paragraph (1) as he applied for the relief within five years after the effective date of the 1952 Act; he entered the United States more than two years prior to the enactment of the Act; he is deportable under a law of

the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the 1917 Act, 39 Stat. 889; he has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application. It follows that his application should have been considered by the Board of Immigration Appeals.

* * * * *

"Under the provisions of §1254(e) an alien who is deportable for failure to comply with the registration requirements may be granted the privilege of voluntary departure only if he can meet the ten-year requirement of §1254(a) (5). It is unreasonable to believe, asserts the government, that notwithstanding Sevitt's inability to meet the standards for the discretionary relief of voluntary departure, Congress intended that he be eligible for the greater relief of suspension of deportation under the standards set forth in paragraph (1) of §1254(a). The answer to this assertion may be found in the time limitation of paragraph (1) which paragraph by its terms became ineffective after June 27, 1957. However, be that as it may, the courts should not resort to conjecture regarding policy decisions of Congress.

* * * * *

"While it is the rule that the courts may depart from the strict wording of a statute in order to give the statute a reasonable construction where a literal construction would result in an absurdity or defeat the object intended by Congress, *Miller* v. *Bank of America N.T. & S.A.*, 9 Cir., 166 F. 2d 415, where the statute is clear and unambiguous it must be literally construed. *Hamilton* v. *Rathbone,* 175 U.S. 414, 20 S. Ct. 155, 44 L. Ed. 219; *Thompson* v. *United States,* 246 U. S. 547, 38 S. Ct. 349, 62 L. Ed. 876; *Crooks* v. *Harrelson,* 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156. Nothing could be clearer than the statement of Congress that the Attorney General may, in his discretion, suspend deportation in the

case of an alien who meets the standards prescribed in paragraph (1) of §1254(a)." *Sevitt* v. *Del Guercio,* 150 F. Supp. 56.

If doubt remains as to the Congressional intent, Title 8 of the United States Code Annotated contains in Volume I a "Commentary on the Immigration and Nationality Act" by Walter M. Besterman, Legal Assistant to the Committee on the Judiciary, House of Representatives of the United States, who assisted in the preparation of the Act. At page 68 he states:

> "In addition to meeting the hardship test and proving that he is a person of good moral character, the alien applying for suspension of deportation must comply with specific requirements and otherwise fall *within one of the five specific categories* set forth by the Act." (emphasis supplied)

As further proof of the intention of Congress that Section 244(a) (1) should stand independently at least of all other Sections in Section 244(a), is the fact that only Section 244(a) (1) permits an application for suspension of deportation in spite of a final order of deportation. Suspension of deportation cannot be granted in Sections 244(a) (2), (3), (4), or (5) categories, if prior to application for relief a final order of deportation issued under the new Act had been served on the alien.

This serves as further proof of the intention of Congress to preserve rights to that class of aliens who were subject to deportation under the provisions of the Immigration Act of 1917, as a savings feature. The savings clause features of the Immigration and Nationality Act have been liberally construed by the courts.

CONCLUSION

It is recommended that the judgment be reversed, and the cause be remanded to the United States District Court for appropriate order remanding the cause to the United States Immigration and Naturalization Service for consideration of the petitioner's application for suspension of deportation under Section 244(a) (1) on its merits, and exercise of the Attorney General's discretion.

Respectfully submitted,

DAVID W. WALTERS,
Attorney for Petitioner.

CERTIFICATE AS TO SERVICE OF COPIES OF BRIEF OF PETITIONER

STATE OF FLORIDA
COUNTY OF DADE } *ss.*

This day personally appeared before me, the undersigned authority, DAVID W. WALTERS, who, being first duly sworn, deposes and states that he is Attorney for the Petitioner in the above-styled cause; that he served two copies of Brief of Petitioner, in the above-styled cause, on this 20 day of February, A. D. 1958, upon THE HONORABLE J. LEE RANKIN, Solicitor General, Department of Justice, Washington 25, D. C., by enclosing such copies in an envelope addressed to The Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C., and, after sealing the same and affixing thereto sufficient postage to carry it to its destination by airmail, deposited same in the United States Post Office Letter Box in the Ainsley Building, in the City of Miami, Florida.

Affiant further states that he served two copies of said Brief of Petitioner, on this 20 day of February, A. D. 1958, upon THE HONORABLE JAMES L. GUILMARTIN, United States Attorney, Post Office Building, Miami 32, Florida, by enclosing such copies in an envelope addressed to The Honorable James L. Guilmartin, United States Attorney, Post Office Building, Miami 32, Florida, and, after sealing the same and affixing thereto sufficient postage to carry it to its destination, deposited same in the United States Post Office Letter Box in the Ainsley Building, in the City of Miami, Florida.

Affiant further states that he served a copy of said Brief of Petitioner, on this 20 day of February, A. D. 1958, upon the defendant, JOSEPH SAVORETTI, District Director of the United States Immigration and Naturalization Service, Miami, Florida, by enclosing such copy in an envelope addressed to Joseph Savoretti,

District Director, United States Immigration and Naturalization Service, Miami, Florida, Post Office Box 622, Biscayne Annex, Miami 52, Florida, and, after sealing the same and affixing thereto sufficient postage to carry it to its destination, deposited same in the United States Post Office Letter Box in the Ainsley Building, in the City of Miami, Florida.

David W. Walters

SUBSCRIBED and sworn to before me at Miami, Florida, this 20 day of February, A. D. 1958.

Notary Public, State of Florida at Large